(2)

174 10-470

No.

Supreme Court, U.S.
FILED
NOV - 5 2010
OFFICE OF THE CLERK

In the

Supreme Court of the United States

LAWRENCE RUSTON, JANET RUSTON,

Petitioners,

– v. –

THE TOWN BOARD FOR THE TOWN OF SKANEATELES, PAUL "BILL" PAVLUS, THADDEUS ASTEMBORSKI, BARBARA SPAIN, DAVID G. LAXTON, THEODORE MURDICK, THE PLANNING BOARD FOR THE TOWN OF SKANEATELES, MARK TUCKER, JOSEPH SOUTHERN, KENNETH JONES, ALAN BRIGGS, LEWIS WELLINGTON, DESSA BERGEN, ROBERT LOTKOWICTZ, THE VILLAGE OF SKANEATELES, JOHN DOE, JANE DOE 1–20,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

TERRY RICE
RICE & AMON
Attorneys for Respondent
The Village of Skaneateles
Four Executive Boulevard
Suite 100
Suffern, New York 10901
(845) 357-4000

COUNTER-QUESTIONS PRESENTED

Whether a plaintiff asserting a class of one equal protection claim must satisfy the pleading standards announced in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009), with respect to each of the elements including the factual basis for asserting the existence of "similarly situated" persons?

Whether the complaint herein was deficient on its face because the factual allegations of the complaint demonstrate that the purportedly similarly situated persons and entities and not similarly situated for purposes of an equal protection claim?

TABLE OF CONTENTS

	Page
COUNTER-QUESTIONS PRESENTED	i
TABLE OF CITED AUTHORITIES	v
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE PETITION	7
I. THE DICTATES OF *TWOMBLY* AND *IQBAL* ARE CLEAR	8
II. NO CONFLICT EXISTS AMONG CIRCUITS REQUIRING RESOLUTION	11
III. GUIDANCE REGARDING *IQBAL* IS UNNECESSARY	14
IV. CERTIORARI IS INAPPROPRIATE WITH RESPECT TO THE EQUAL PROTECTION ALLEGATIONS AGAINST THE VILLAGE	16
CONCLUSION	17

TABLE OF CITED AUTHORITIES

Federal Decisions:

Arista Records LLC v. Doe, 604 F.3d 110 (2d Cir. 2010) 15

Ashcroft v. Iqbal, 129 S.Ct. 1937 (2009) ..... *passim*

Baraka v. McGreevey, 481 F.3d 187 (3d Cir. 2007) 12

Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) ..... *passim*

Campbell v. Rainbow City, 434 F.3d 1306 (11th Cir. 2006) 7

Clubside, Inc. v. Valentin, 468 F.3d 144 (2d Cir. 2006) 6, 7

Conley v. Gibson, 355 U.S. 41 (1957) 8, 9, 10

DeMuria v. Hawkes, 328 F.3d 704 (2d Cir. 2003) 5, 9, 10, 13

Engquist v. Oregon Dep't of Agric., 553 U.S. 591 (2008) 4

Harris v. Mills, 572 F.3d 66 (2d Cir. 2009) 6

Hayden v. Paterson, 594 F.3d 150 (2d Cir. 2010) 5

In re Insurance Brokerage Antitrust Litigation, ___ F.3d ___, 2010 WL 3211147 (3d Cir. 2010) 14

Jacobs v. Mostow, 271 Fed.Appx. 85 (2d Cir. 2008) 8

Jaghory v. New York State Dep't of Educ.,
131 F.3d 326 (2d Cir. 1997) 10

Livant v. Clifton, 272 Fed.Appx. 113
(2d Cir. 2008)..... 8

Mann v. Brenner, 375 Fed.Appx. 232
(3d Cir. 2010)..... 11-12

Phillips v. County of Allegheny, 515 F.3d 224
(3d Cir. 2008)..... 12-13

Rosendale v. Bruise, 374 Fed.Appx. 195
(2d Cir. 2010)..... 8

Ruston v. Town Board for Skaneateles,
2008 WL 5423038 (N.D.N.Y. 2008) 2

Ruston v. Town Board for Skaneateles,
2009 WL 3199194 (N.D.N.Y. 2009) 4

Ruston v. Town Board for Skaneateles,
610 F.3d 55 (2d Cir. 2010) 5

Swanson v. Citibank, N.A., 614 F.3d 400
(7th Cir. 2010) 14

Turkman v. Ashcroft, 589 F.3d 542
(2d Cir. 2009)..... 15

Village of Willowbrook v. Olech,
528 U.S. 562 (2000)..... 9, 10, 11

Federal Rules:

Federal Rules of Civil
Procedure 8..... 8, 12, 13, 13n.1, 14, 15

New York State Decisions:

Ciaola v. Town of Ossining, 272 A.D.2d 324, 707 N.Y.S.2d 200 (2d Dept.), *lv. denied*, 95 N.Y.2d 761, 714, N.Y.S.2d 711, 737 N.E.2d 953 (2000) 1

Heritage Company of Massena v. Village of Massena, 192 A.D.2d 1039, 597 N.Y.S.2d 214 (3d Dept. 1993) 1

Fraccola v. City of Utica Board of Water Supply, 70 A.D.2d 768, 417 N.Y.S.2d 357 (4th Dept. 1979) 1

Kontokosta v. Village of Greenpoint, 1991 WL 206296 (S.D.N.Y. 1991) 1

Town of Ithaca v. Village of Cayuga Heights, 184 A.D.2d 78, 590 N.Y.S.2d 321 (3d Dept. 1992) 1

STATEMENT OF THE CASE

Petitioners own a large parcel of property located outside the Village of Skaneateles (the "Village"), in the Town of Skaneateles (the "Town") and wished to construct 12 additional dwelling units on the property. In addition to zoning approvals required from the Town, Petitioners sought permission to connect those additional units to the Village sewer system. Pursuant to New York law, Petitioners had no right to such additional connections and the Board of Trustees possessed considerable discretion in entertaining such a request. *See, e.g., Kontokosta v. Village of Greenpoint*, 1991 WL 206296 (S.D.N.Y. 1991); *Ciaola v. Town of Ossining*, 272 A.D.2d 324, 324, 707 N.Y.S.2d 200, 201 (2d Dept.), *lv. denied*, 95 N.Y.2d 761, 714, N.Y.S.2d 711, 737 N.E.2d 953 (2000); *Heritage Company of Massena v. Village of Massena*, 192 A.D.2d 1039, 1040, 597 N.Y.S.2d 214, 215 (3d Dept. 1993); *Fraccola v. City of Utica Board of Water Supply*, 70 A.D.2d 768, 769, 417 N.Y.S.2d 357, 358 (4th Dept. 1979). Moreover, because a municipality possesses the paramount obligation to ensure that adequate sewer facilities are available to its residents, it cannot provide such services to nonresidents if the provision of such services possesses the potential to adversely affect the provision of such service to its residents and must discontinue such services if an insufficiency for its residents might exist. *See Town of Ithaca v. Village of Cayuga Heights*, 184 A.D.2d 78, 590 N.Y.S.2d 321 (3d Dept. 1992). Because of capacity issues, the Village denied Petitioners' request for the additional sewer hook-ups.

Petitioners instituted an action against the Village and the Town Defendants on or about August 1, 2006. The complaint asserted claims against the Village for: conspiracy to violate Petitioners' civil rights pursuant to 42 U.S.C. § 1985(3); substantive due process and equal protection. The District Court granted the Village's motion to dismiss the complaint. *See Ruston v. Town Board for Skaneateles*, 2008 WL 5423038 (N.D.N.Y. 2008). With respect to Petitioners' equal protection claim, the Court determined that the "single allegation" in the complaint regarding purported selective treatment was "insufficient to state a claim that Defendant Village treated others, with a high degree of similarity to Plaintiffs, differently." (55a). *Ruston*, 2008 WL 5423038 at 6. The Court permitted Petitioners to file an amended complaint with respect to their equal protection claim "because Plaintiffs may be able to plead sufficiently that Defendant Village treated similarly situated individuals differently." (57a). *Id.* at 7.

Petitioners filed an amended complaint asserting only a class-of-one equal protection claim as against the Village with respect to the claimed November 2004 denial of Petitioners' request for additional sewer hook-ups. The complaint identified various other properties to which Petitioners claim to be similarly situated. It was alleged that approval was granted to Edmonds in or about 1987 (83a) (16 years before the subject denial); the Skaneateles Country Club connection occurred "in the early 1990's" (82a); the Parker property was connected "for decades" (¶83a); the Bower property was connected in the late 1990's (83a); Ianno received a connection in 1998

(84a) and no time frame is provided for the Chase Design project (84a). Further, Petitioners wish to construct and sell 12 single-family homes on their 27-acre lake front property (61a) in addition to the existing units. It was alleged that Edmonds received permission to connect "a new home" (82a); the Skaneateles Country Club apparently is a traditional country club with no residential units (82a); an unspecified number of dwelling units, apparently one, is connected to the system from the Parker property (83a); Kennan erected " a brand new house" (83a), that is, one dwelling unit; the Bower property is a "spa"; the use of the Ianno property is not specified (84a); and the Chase Design property is alleged to be a "commercial building" apparently with no residential dwelling units (84a). The size of the foregoing purportedly similar properties is not alleged.

By Decision and Order dated September 30, 2009, the District Court granted the Village's motion to dismiss the amended complaint. The Court determined that:

> Plaintiffs' allegations in support of their equal protection claim against Defendant Village all relate to the decision to deny Plaintiffs sewer-system access for the proposed development. In its prior decision, this Court discussed the discretionary nature of the decision to grant sewer access when discussing Plaintiffs' previously asserted substantive due process claim against Defendant Village and concluded that Plaintiffs lacked a property interest because Defendant Village had discretion.

(20a). *Ruston v. Town Board for Skaneateles*, 2009 WL 3199194 at 2 (N.D.N.Y. 2009). Because a class-of-one equal protection claim may not be based on discretionary governmental action pursuant to *Engquist v. Oregon Dep't of Agric.*, 553 U.S. 591(2008), the District Court found that the complaint failed to state an equal protection claim as a matter of law.

Petitioners appealed the foregoing decisions to the Court of Appeals which, by Judgment dated July 8, 2010, affirmed the dismissal of the complaints. With respect to the applicable pleading standard, the Court determined that:

> The Supreme Court has recently clarified the pleading standard required to withstand a motion to dismiss. '[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss. Determining whether a complaint states a plausible claim for relief will ... be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.' *Ashcroft v. Iqbal*, ___ U.S. ___, ___, 129 S.Ct. 1937, 1950, 173 L.Ed.2d 868 (2009) (internal citation omitted). 'While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.' *Id.*; *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 565-66, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007).

(10a), *Ruston v. Town Board for Skaneateles*, 610 F.3d 55, 58-59 (2d Cir. 2010).

The Court noted that:

> District courts in our Circuit differ as to the impact of this pleading standard on a 'class of one' equal protection claim. This uncertainty is attributable to the tension between [i] this Court's decision in *DeMuria v. Hawkes*, 328 F.3d 704, 707 (2d Cir.2003), which held under a now-obsolete pleading standard that a 'class of one' claim is adequately pled ('albeit barely' so) even without specification of others similarly situated, and [ii] the Supreme Court's recent clarifications, which require that a complaint allege facts sufficient to establish 'a plausible claim for relief,' *Iqbal*, 129 S.Ct. at 1950; *see also Twombly*, 550 U.S. at 566, 127 S.Ct. 1955.

(10a-11a), *Ruston*, 610 F.3d at 59.

The Court concluded that:

> We hold that the pleading standard set out in *Iqbal* supersedes the general allegation' deemed sufficient in *DeMuria*, 328 F.3d at 707. Under *Iqbal*, factual allegations must be sufficient to support necessary legal conclusions. *See Iqbal*, 129 S.Ct. at 1950-51. 'A court 'can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth.' ' *Hayden v. Paterson*, 594 F.3d 150, 161 (2d Cir.2010) (*quoting Iqbal*, 129 S.Ct. at 1950). 'We next consider the factual allegations in [the] complaint to determine if

> they plausibly suggest an entitlement to relief.' *Iqbal*, 129 S.Ct. at 1951; *see also Harris v. Mills*, 572 F.3d 66, 72 (2d Cir.2009).

(11a). *Id.*

Applying that standard, the Court found that the Petitioners had failed to state a claim against the Town because they did "not allege specific examples of the Town's proceedings, let alone applications that were made by persons similarly situated. The equal protection claim as to the Town defendants therefore fails for lack of factual allegations to support the legal conclusion." (11a-12a). *Id.* at 59.

However, with respect to the equal protection claim against the Village, the Court of Appeals determined that, consistent with a significant body of case law, the purportedly comparable "similarly situated" persons or entities upon which Petitioners premised their claim were not similarly situated as a matter of law. The Court related that "[C]lass-of-one plaintiffs must show an extremely high degree of similarity between themselves and the persons to whom they compare themselves." (12a) *Id.* (*quoting Clubside, Inc. v. Valentin*, 468 F.3d 144, 159 (2d Cir.2006)). The Court found that:

> Under this standard, none of the properties cited by the Rustons suffice: a house built in 1987; a country club that was renovated in 'the early 1990's'; two neighboring properties-'connected to the Village sewer system for decades'-that are not further described; a house built 'in or around 2004'; a 'luxury spa' built 'in the late 1990's'; and a 'large commercial building.' None of these

> properties is similar to the Rustons' proposed 14-home development, let alone so similar that no rational person could see them as different: some are commercial properties versus the residential properties at issue, *see Campbell v. Rainbow City*, 434 F.3d 1306, 1314-15 (11th Cir.2006) (properties that differed in land use were not prima facie similarly situated); *see also Clubside, Inc.*, 468 F.3d at 159, and the residential connections were single homes, not a new development as proposed by the Rustons, *see id.* at 159-60 (projects involving 'different types of housing and density levels' were not similarly situated as a matter of law).

(12a-13a). *Id.* at 59-60.

As a result, the Court of Appeals concluded that Petitioners failed to state a class of one equal protection claim.

REASONS FOR DENYING THE PETITION

Supreme Court Rule 10 provides that "[a] petition for a writ of certiorari will be granted only for compelling reasons. It is respectfully submitted that the petition should be denied because it fails to satisfy any of the permissible grounds for granting certiorari.

I. THE DICTATES OF *TWOMBLY* AND *IQBAL* ARE CLEAR

In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), this Court abrogated the previous standard of *Conley v. Gibson*, 355 U.S. 41 (1957). Instead, "[t]o survive a motion to dismiss, a complaint must plead 'enough facts to state a claim to relief that is plausible on its face.'" *Twombly*, 550 U.S. at 570. The Court confirmed the *Twombly* standard in *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009), and related that "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged-but it has not 'show[n]'-'that the pleader is entitled to relief.'" *Id.* at 1950 (*quoting* FRCP 8(a)(2)).

Twombly requires that a complaint's "[f]actual allegations be enough to raise a right to relief above the speculative level...." *Twombly*, 550 U.S. at 555, and obligates a pleader to amplify a claim with factual allegations in those contexts where such amplification is needed to render the claim plausible. *See Livant v. Clifton*, 272 Fed.Appx. 113, 114 (2d Cir. 2008); *Jacobs v. Mostow*, 271 Fed.Appx. 85, 87 (2d Cir. 2008). "[T]he cases requiring such amplification are the rule, not the exception..." *Rosendale v. Bruise*, 374 Fed.Appx. 195, 196 (2d Cir. 2010).

"While legal conclusions can provide the framework for a complaint, they must be supported by factual allegations." *Iqbal*, 129 S.Ct. at 1950. "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Id.* at 1949 (*quoting Twombly*, 550 U.S. at 555). "Threadbare recitals of the

elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.*(*citing Twombly*, 550 U.S. at 555). This Court has further determined that courts "are not bound to accept as true a legal conclusion couched as a factual allegation" *Id.* at 1950 (*quoting Twombly*, 550 U.S. at 555). Consistent therewith, "a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." *Id.*

DeMuria v. Hawkes, 328 F.3d 704 (2d Cir. 2000), which was overruled by *Ruston*, concluded that a complaint asserting a class of one claim was not required to identify "actual instances where others have been treated differently for the purposes of equal protection." *Id.* at 707. The Court also noted that the plaintiff in *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000), did not "name names in her complaint, but made the more general allegation that similarly situated property owners had been asked for a different easement." *DeMuria*, 328 F.3d at 707. Based on *DeMuria* and its reasoning, Petitioners primarily base their petition on the claim that when the Second Circuit found that *Iqbal* had superseded *DeMuria*, it necessarily concluded that *Iqbal* overruled *Olech* with respect to pleading requirements for a class-of-one claim." (p. 15-16).

DeMuria, like *Olech*, were considered pursuant to the now abrogated standards of *Conley*. In fact, in sustaining the sufficiency of the complaint in *DeMuria*, the Court related the then-applicable standard as: "The court may not dismiss a complaint unless it appears beyond doubt, even when the

complaint is liberally construed, that the plaintiff can prove no set of facts which would entitle him to relief." *DeMuria*, 328 F.3d at 706 (*quoting Jaghory v. New York State Dep't of Educ.*, 131 F.3d 326, 329 (2d Cir. 1997)). The *DeMuria* Court utilized the identical standards as was announced in *Conley*, 355 U.S. at 45-46 ("a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."). That pleading standard now is inapplicable and a complaint must be analyzed pursuant to *Twombly* and *Iqbal*.

Petitioners assert that the Court should grant certiorari to determine "whether *Iqbal* did indeed render *Olech* dead letter law...." (p. 16). It is clear that acceptance of Petitioners' logic as a basis for granting certiorari would essentially mean that the Court should separately determine the effect of the pleading requirement of *Twombly* and *Iqbal* for each substantive area of law and presumably each statutory cause of action. Clearly, that is not the case. *Twombly* and *Iqbal* apply to all federal actions regardless of the basis for the claim. *See Twombly*, 550 U.S. at 554; *Iqbal*, 129 S.Ct. at 1953. Although, as acknowledged by *Iqbal*, the level of factual allegations sufficient to sustain a complaint will vary depending on the context, *see Iqbal*, 129 S.Ct. at 1950, it is clear that a complaint must plead enough facts to state a claim to relief that is plausible on its face and that bald conclusions do not satisfy the plausibly requirement of *Twombly* and *Iqbal*. Indeed, *Twombly* related that "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief

requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555. That requirement applies to complaints asserting a class of one equal protection claims, just as it applies to every other federal complaint. In alleging a class of one claim, a plaintiff may not simply assert that he or she was treated differently than other similarly situated persons.

It is respectfully submitted that the application of *Twombly* and *Iqbal* is apparent and that no need for clarification exists in the instant context.

II. NO CONFLICT EXISTS AMONG CIRCUITS REQUIRING RESOLUTION

Petitioners suggest that the Court should grant certiorari because "[t]he Second Circuit's post-*Iqbal* treatment of class-of-one equal protection pleading requirements stands in stark contrast to the Third Circuit's treatment." (p. 16). However, a review of the Third Circuit decisions cited by Petitioners reflects a thoughtful analysis of the Supreme Court's discussion of the issue by the Court, but fails to reveal a conflict in the ultimate conclusion of those decisions.

Petitioners rely on *Mann v. Brenner*, 375 Fed.Appx. 232 (3d Cir. 2010), as the purported basis for a conflict among the circuits, contending that "Mann's failure to name names was not why the court deemed dismissal appropriate. No, the court took for granted that *Olech* would protect a plaintiff who, awaiting discovery did not specify those persons more favorably treated though alike in circumstance."

(p. 17). In fact, Petitioners arguments and recitation of language from the decision substantiate that no conflict exists with the decision in *Ruston*.

Mann confirms that "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Id.* at 235 (*quoting Phillips v. County of Allegheny*, 515 F.3d 224, 234 (3d Cir. 2008) (*quoting Twombley*, 550 U.S. at 555)). The *Mann* Court additionally confirmed its reasoning in *Baraka v. McGreevey*, 481 F.3d 187,195 (3d Cir. 2007), that "we are not compelled to accept unsupported conditions and unwarranted inferences, or a legal conclusion as a factual allegation." *Mann*, 375 Fed.Appx. at 236. Specifically with respect to Mann's equal protection claim, the Court concluded that "[w]ithout any allegation regarding other blighted property owners, Mann simply cannot 'nudge [his] claims across the line from conceivable to plausible.'" *Id.* at 238-39 (*quoting Twombly*, 550 U.S. at 570). Petitioners' characterization of the rationale of *Mann* is inaccurate and the philosophy expressed therein is consistent with the reasoning of *Ruston* and adheres to the unambiguous dictates of *Twombly* and *Iqbal*.

Similarly, *Phillips v. County of Allegheny*, 515 F.3d 224 (3d Cir. 2008), decided after *Twombly* but prior to *Iqbal*, confirmed that "a plaintiff's [Rule 8] obligation to provide the 'grounds' of his 'entitle[ment] to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 231 (*quoting Twombly*, 550 U.S. at 545). The Third Circuit determined that the Court had held in *Twombly* that "Rule 8 'requires a showing,' rather than a blanket assertion, of entitlement to relief." *Id.* (*quoting*

Twombly, 550 U.S. at 555 n.3). Additionally, the Court related that "without some factual allegation in the complaint, a claimant cannot satisfy the requirement that he or she provide 'fair notice,' but also the 'grounds' on which the claim rests." *Id.* at 232 (*quoting Twombly*, 550 U.S. at 555). As a result, the *Phillips* Court concluded that "[a]fter *Twombly*, it is no longer sufficient to allege mere elements of a cause of action; instead 'a complaint must allege facts suggestive of [the proscribed] conduct. *Id.* at 233 (*quoting Twombly*, 550 U.S. at 563). Lastly, after the Third Circuit considered the allegedly contradictory direction of the Court regarding Rule 8 and the plausibility requirement and the holding in *DeMuria*, it concluded that the *Phillips*' complaint failed to "contain specific allegations that he was treated differently." *Id.* at 245.

It is respectfully submitted that no conflict exists between the circuits which requires direction by this Court.[1]

---

[1] Petitioners' contentions that one should not "put much hope" in discovery to develop facts and uncover evidence and that one "is expected to have all the facts of her case at the start," are misplaced (p. 20). Initially, it is reckless for a plaintiff to institute an action, particularly a civil rights action, unless the plaintiff has a firm understanding of the factual underpinnings for the claim. One cannot assert bald, factless conclusion and hope to support such speculation in discovery. Contrary to Petitioners' plea, "Rule 8 ... does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Iqbal*, 129 S.Ct. at 1950.

III. GUIDANCE REGARDING *IQBAL* IS UNNECESSARY

Petitioners contend that "the depth and breadth" of *Iqbal* remain unclear, advocating the granting of certiorari to elucidate its parameters (p. 21). As is related above, the directives of *Twombly* and *Iqbal* are abundantly clear and do not require clarification from the Court.

Petitioners refer to a number of decisions in which the courts discuss the interplay between Rule 8 and the requirements of *Twombly* and *Iqbal*. However, the dispute primarily is one of semantics and, it is submitted, it is difficult to credibly contend that the principles elucidated in those decisions are anything other than completely clear.

Petitioners selectively quote from *Swanson v. Citibank, N.A.*, 614 F.3d 400 (7th Cir. 2010), to suggest that the courts are unable to integrate Rule 8 and the dictates of *Twombly* and *Iqbal* (p. 21-22). However, a review of the entire decision confirms that the decision is not inconsistent with *Twombly* and *Iqbal*. For example, the Court concluded that a "plaintiff must give enough details about the subject-matter of the case to present a story that holds together." *Id.* at 404. Similarly, contrary to the implication asserted regarding *In re Insurance Brokerage Antitrust Litigation*, ___ F.3d ___, 2010 WL 3211147 (3d Cir. 2010), (p. 22), and consistent with *Twombly* and *Iqbal*, the Third Circuit related that:

> '[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic

> recitation of the elements of a cause of action will not do.' *Twombly*, 550 U.S. at 555, 127 S.Ct. 1955 (quoting Fed.R.Civ.P. 8(a)(2)). Because Federal Rule of Civil Procedure 8(a)(2) 'requires a 'showing,' rather than a blanket assertion, of entitlement to relief,' courts evaluating the viability of a complaint under Rule 12(b)(6) must look beyond conclusory statements and determine whether the complaint's well-pled factual allegations, taken as true, are 'enough to raise a right to relief above the speculative level.' *Twombly*, 550 U.S. at 555 & n. 3, 127 S.Ct. 1955. The test, as authoritatively formulated by *Twombly*, is whether the complaint alleges 'enough fact[ ] to state a claim to relief that is plausible on its face,' *id.* at 570, 127 S.Ct. 1955....

2010 WL 3211147 at 9.

In *Arista Records LLC v. Doe*, 604 F.3d 110 (2d Cir. 2010), the Second Circuit determined that the dictates of *Twombly* and *Iqbal* did not represent a heightened pleading standard. Consistently, the Court concluded that "*Twombly and Iqbal* require 'factual amplification [where] needed to render a claim plausible...." *Id.* at 120 (*quoting Turkman v. Ashcroft*, 589 F.3d 542, 546 (2d Cir. 2009)).

As a result, guidance is not required to clarify the pleading requirements.

IV. CERTIORARI IS INAPPROPRIATE WITH RESPECT TO THE EQUAL PROTECTION ALLEGATIONS AGAINST THE VILLAGE

The foregoing discussion regarding the pleading jurisprudence relating to the equal protection claim asserted against the Village primarily is academic because the amended complaint relates the claimed factual predicate for Petitioners' claim. As is related at length above (p. 2-3, 6, 7). Petitioners alleged what they considered to be the factual basis for contending that the various properties to which they seek to compare themselves are similarly situated. However, consistent with well-established case law, the allegations of the amended complaint, on their face, demonstrate that the properties to which Petitioners seek to compare themselves are not similarly situated as a matter of law.

A lack of factual contentions is not the deficiency with respect to Petitioners' equal protection claim against the Village. Instead, the factual assertions demonstrate that an equal protection claim has not been stated because the purportedly similarly situated properties are not, on their face, sufficiently similar to assert a viable claim.

As a result, it is respectfully submitted, that the instant matter is, additionally, particularly inappropriate to consider the ramifications of *Twombly* and *Iqbal*.

CONCLUSION

It is respectfully submitted that, for the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

TERRY RICE
RICE & AMON
Attorneys for Respondents
Four Executive Boulevard
Suite 100
Suffern, New York 10901
(845) 357-4000

October 27, 2010

APPEALTECH
7 West 36th Street, 10th Floor
New York, New York 10018
(212) 213-3222
{16944}